151 U S 360

TRANSCRIPT OF RECORD.

882

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 941.

DORIS WERNER, PLAINTIFF IN ERROR,

vs.

THE CITY COUNCIL OF CHARLESTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED MAY 24, 1893.

(15,325.)

LAW ASSOCIATION
OF
PHILADELPHIA

(15,325.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No 941.

DORIS WERNER, PLAINTIFF IN ERROR,

vs.

THE CITY COUNCIL OF CHARLESTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

INDEX.

	Original.	Print.
Writ of error	1	1
Return to writ of error	3	2
Citation (copy)	4	2
Proof of service of citation (copy)	5	2
Citation (original)	6	3
Proof of service of citation (original)	7	3
Caption	9	4
Transcript from court of common pleas	9	4
Summons	9	4
Complaint	10	5
Proof of service of summons and complaint	12	7
Demurrer to complaint	13	8
Order overruling demurrer	13	8
Notice of appeal and exceptions	14	8
Agreement as to record on appeal	15	9
Minute entry of argument and submission	16	10
Opinion	17	10
Motion for certificate of Federal question	23	14
Order for certificate of Federal question	24	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 24, 1893.

	Original.	Print.
Certificate of Federal question	26	15
Petition for writ of error	29	16
Exhibit A—An act to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases, and for other purposes	33	19
B—Sections 227 and 228 of the Revised Ordinances of the city of Charleston	34	19
Order allowing writ of error	36	20
Assignment of errors	37	21
Bond on writ of error	43	23
Clerk's certificate	46	25

1 "*a.*"

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of South Carolina, Greeting:

Whereas in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity in the said State of South Carolina in which a decision could be had in the said suit between The City Council of Charleston, plaintiff, and Doris Werner, defendant, wherein was drawn in question the validity of a statute of the said State of South Carolina and certain sections of the Revised Ordinances of the city of Charleston, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity, a manifest error hath happened, to the great damage of the said Doris Werner, as by her said complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 24th day of May, A. D. 1893, in the said Supreme Court to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 24th day of April, in the year of our Lord 1893.

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
Clerk of the Circuit Court of the United States for the District of South Carolina.

Allowed by—

HENRY McIVER.
Chief Justice of the Supreme Court of the State of S. C.

2 [Endorsed:] Supreme Court of the United States. Doris Werner, plaintiff in error, *vs.* The City Council of Charleston, defendant in error. Writ of error. Mordecai & Gadsden, att'ys for plaintiff in error. Supreme court of South Carolina, clerk's office, Columbia, S. C. Filed Apr. 24, 1893. Albert M. Boozer, clerk. Filed 24 April, 1893. J. E. Hagood, C. C. C. U. S., dist. S. C.

3 "*b.*"

In the Supreme Court of the United States.

DORIS WERNER, Plaintiff in Error,
vs.
THE CITY COUNCIL OF CHARLESTON, Defendant in Error.

The answer of the chief justice and associate justices of the supreme court of the State of South Carolina, being the judges of the supreme court of the State of South Carolina within named: A transcript of the record whereof mention is within made, with all things touching or in anywise concerning the same, we hereby certify, under the seal of our said court, to the justices of the Supreme Court of the United States within mentioned in a certain schedule to this writ annexed, as within it is commanded.

Dated at Columbia, S. C., May 17th, 1893.

By the court:

[Seal Supreme Court of South Carolina.]

ALBERT M. BOOZER,
Clerk of the Supreme Court of the State of South Carolina.

4 "*c.*"

UNITED STATES OF AMERICA, *ss:*

To the City Council of Charleston, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., on the 24th day of May, 1893, pursuant to the writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein Doris Werner is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 24th day of April, 1893.

HENRY McIVER,
Chief Justice of the Supreme Court of the State of South Carolina.

5 "*c c.*"

STATE OF SOUTH CAROLINA, *Charleston County,* } *ss:*

Orlando R. Levy, being duly sworn, deposes and says that he is of citizen and resident of the city of Charleston, State of South Carolina, and is over twenty-one years of age; that he is not a party to the action mentioned in the attached and within citation; that on the 26th day of April, 1893, he served the within and attached citation upon the within-named defendant in error, The City Council of Charleston, by delivering to and leaving with John F. Ficken

mayor of the said city of Charleston, at his office, in the city hall, in the city of Charleston, county and State aforesaid, a true, correct, and complete copy of the said citation.

And affiant further says that he knows the person so served by him as aforesaid to be John F. Ficken, the mayor of the city of Charleston.

ORLANDO R. LEVY.

Subscribed and sworn to before me this 26th day of April, 1893.
[SEAL OF OFFICE.] JACOB WILLIMAN,
Notary Public, S. C.

Endorsed: Supreme Court of the United States. Doris Werner, plaintiff in error, *vs.* The City Council of Charleston, defendant in error. Citation and proof of service. Mordecai & Gadsden, att'ys for plaintiff in error. Supreme court of South Carolina, clerk's office, Columbia, S. C. Filed April 24th, 1893. Albert M. Boozer, clerk.

6 "*d.*"

EXHIBIT "A."

UNITED STATES OF AMERICA, *ss:*

To the City Council of Charleston, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., on the 24th day of May, 1893, pursuant to the writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein Doris Werner is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 24th day of April, 1893.

HENRY McIVER,
Chief Justice of the Supreme Court of the State of South Carolina.

7 "*d d.*"

STATE OF SOUTH CAROLINA, }
Charleston County, } *ss:*

Orlando R. Levy, being duly sworn, deposes and says that he is a citizen and resident of the city of Charleston, State of South Carolina, and is over twenty-one years of age; that he is not a party to the action mentioned in the attached and within citation; that on the 26th day of April, 1893, he served the within and attached citation upon the within-named defendant in error, The City Council of Charleston, by delivering to and leaving with John F. Ficken, mayor of the said city of Charleston, at his office, in the city hall, in the city of Charleston, county and State aforesaid, a true, correct, and complete copy of said citation.

And affiant further says that he knows the person so served by him as aforesaid to be John F. Ficken, the mayor of the city of Charleston.

ORLANDO R. LEVY.

Subscribed and sworn to before me this 26th day of April, 1893.

[Seal Jacob Williman, Notary Public, Charleston, S. C.]

JACOB WILLIMAN,
Notary Public, S. C.

8 [Endorsed:] Supreme Court of the United States. Doris Werner, plaintiff in error, *vs.* The City Council of Charleston, defendant in error. Citation and proof of service. Mordecai & Gadsden, att'ys for plaintiff in error. Supreme court of South Carolina, clerk's office, Columbia, S. C. Filed Apr. 24, 1893. Albert M. Boozer, clerk.

9 In the Supreme Court of the State of South Carolina.

THE CITY COUNCIL OF CHARLESTON, Plaintiff, Respondent,
vs.
DORIS WERNER, Defendant, Appellant.

Record.

Be it remembered that upon the 24th day of June, 1889, a summons for relief and complaint was filed by The City Council of Charleston against Doris Werner in the court of common pleas for the county of Charleston and State of South Carolina; which said summons for relief and complaint were in the words following, to wit:

"*c.*"

STATE OF SOUTH CAROLINA,
County of Charleston.

Court of Common Pleas.

THE CITY COUNCIL OF CHARLESTON, Plaintiff,
vs.
Mrs. DORIS WERNER, Defendant.

Summons for Relief; Complaint Served.

To the defendant, Mrs. Doris Werner:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber, at his office, # 33 Broad St., Charleston, S. C., within twenty days after the service hereof, exclusive of the day of such service, and if you fail to answer the complaint within the time aforesaid

the plaintiff in this action will apply to the court for relief demanded in the complaint.

Dated at Charleston, June 12th, 1889.

CHARLES INGLESBY,
Corporation Counsel, Plaintiff's Attorney.

THEO. G. BOAG,
C. C. P. & G. S.

[SEAL OF COURT.]

Filed June 24th, 1889.

THEO. G. BOAG,
C. C. P. & G. S.

10 "*f.*"

THE STATE OF SOUTH CAROLINA,
City and County of Charleston.

In the Court of Common Pleas.

THE CITY COUNCIL OF CHARLESTON
vs.
Mrs. DORIS WERNER.

Complaint.

The said City Council of Charleston, plaintiff, complaining of the said Mrs. Doris Werner, the defendant, alleges:

I. That it, the said plaintiff, is a municipal corporation under the laws of the State of South Carolina.

II. That by section- 227 and 228 of the Revised Ordinances of the city of Charleston, ratified in city council on the 26th day of September, 1882, it is ordained and enacted as follows—that is to say:

SECTION 227. Whenever it shall appear to the board of health that any low lots or vacant grounds are in a condition to injure or endanger the public health, it shall be the duty of the said board of health to appoint a board of inspection, to be composed of the city registrar and four members of the board of health (any three of whom shall be a quorum), whose duty it shall be to enter upon and thoroughly examine such lots or vacant grounds, and determine by the vote of not less than three of the said board, whether such lots or vacant grounds shall be drained, filled up, levelled, or otherwise so improved, as to remove the nuisance and evil there complained of or existing. And should the said board of inspection be of opinion that such lots or vacant grounds ought to be filled up, levelled or drained, they shall submit a detailed report to the city council, setting forth the actual condition thereof, and suggesting the mode, materials, and extent to which such low lots or vacant grounds shall be filled up, levelled or drained; upon which report council shall take such order and direction thereon as they may deem expedient.

SEC. 228. In case council shall order the report of said board of inspection, made as aforesaid, to be carried into effect, or shall di-

rect such low lots to be filled up, levelled or drained, it shall be the duty of the city registrar to serve a notice, in writing, on the owner or owners of such low lots or vacant grounds directing said owner or owners to have such lots or vacant grounds filled up, levelled or drained, as council may require, to such extent, in such manner, with such materials, and within such reasonable time as may be prescribed by the said order of the city council. And, in case of neglect or refusal of such owner or owners to obey said notice, it shall be the duty of the city registrar to cause such lots or grounds to be filled up, levelled or drained in the manner prescribed in the said notice, under the order and direction of the said board of inspection. The expenses and charges paid and incurred in case such lots or grounds shall be filled up, levelled or drained, under the order of the board of inspection, shall be paid in the first instance, out of the city treasury, and shall afterwards be recovered, with interest and costs of suit, in an action of debt, to be brought by council in the court of common pleas, against the owner or owners of such lots or grounds. The city engineer shall, whenever required, attend the said board of inspection on the examination of low lots and grounds, and under their direction make plans for filling, levelling and draining the same.

III. That the defendant is the owner in fee simple of all that lot, piece, or parcel of land, with the buildings thereon, situate, lying and being on the west side of Smith street, in the city of Charleston, now or formerly known as No. 47 on said street, measuring and containing ninety-three feet in front on Smith street by two hundred feet in depth, be the same more or less, -butting and bounding north on land of Dr. John C. Faber, east on Smith street aforesaid, south on land of W. J. Parker, and west on land formerly of Thomas Bennett.

11

IV. That the rear portion of the said lot of the said defendant was a low lot extending out into what was formerly a part of Bennett's mill pond and in a condition to injure and endanger the public health.

V. That the board of health of the said city of Charleston, as required by the ordinances hereinbefore recited, appointed a board of inspection, composed of the city registrar and four members of the board of health, to enter upon and thoroughly examine said lot and determine whether the same should be drained, filled up, levelled, or otherwise so improved as to remove the nuisance and evil there existing.

That the said board of inspection inspected the said premises, determined that the said lot should be filled up to a proper level above the street, and pursuant to such determination the said board submitted a detailed report thereof to the city council, setting forth the actual condition thereof and suggesting the mode, materials, and extent to which the said lot should be filled up: that thereupon the said city council, by a resolution passed at a meeting held January, 1888, ordered and directed that the findings of the said board of inspection be carried into effect.

VI. That thereupon the city registrar on the 28th day of January,

1888, did serve a notice in writing, as required by the ordinance aforesaid, on the said defendant, the owner of the said low lot of land, requiring her to fill the said lot with sand, gravel, clay, or shell to a level even with the grade pegs placed by the city engineer within sixty days from the date of said notice, and notifying her, the said defendant, that if the said filling was not done within the time specified that the same would be done by the city council at her expense.

VII. That, the said sixty days having expired, the city registrar did cause the said lot to be filled up in the manner prescribed in the said notice under the order and direction of the said board of inspection, depositing upon the said lot fifteen hundred and three (1,503) cubic yards of earth, at an expense of eleven hundred and fifty-seven and $\frac{10}{100}$ ($1,157.10) dollars, which hath been paid out of the city treasury, and that no part thereof has been paid by the said defendant; and the plaintiff alleges that the said sum of $1,157.10 does not exceed one-half the value of defendant's lot of land.

Wherefore plaintiff demands judgment against the said defendant for the said sum of eleven hundred and fifty-seven and $\frac{10}{100}$ ($1,157.10) dollars, with interest and costs.

CHARLES INGLESBY,
Corporation Counsel.

12 "*g.*"

Proof of service of which summons for relief and complaint are in the words following, to wit:

THE CITY COUNCIL OF CHARLESTON
vs.
MRS. DORIS WERNER.

STATE OF SOUTH CAROLINA,
County of Charleston.

O. R. Levy, being duly sworn, says that he served the summons and complaint in this action on the defendant by delivering to her personally and leaving with her copies of the same, at Charleston, S. C., on the twenty-seventh day of June, A. D. 1889, and that he knows the person so served to be the one mentioned and described in the summons as Mrs. Doris Werner, defendant therein, and the deponent is not a party to the action.

(Signed) O. R. LEVY.

Sworn to before me this 5th day of July, A. D. 1889.
THEODORE G. BOAG,
C. C. P. & G. S.

And thereafter, upon the 17th day of July, 1889, the said defendant, Doris Werner, appeared by her attorneys, Mordecai & Gadsden; and, the case coming on to be heard at the February term, 1892, in said court of common pleas for the county of Charleston, in said State, as soon as the complaint had been read the defendant, Mrs.

Doris Werner, through her counsel, interposed an oral demurrer to the complaint in the words following, to wit:

13 "*h.*"

The defendant demurs to the complaint herein because it does not state facts sufficient to constitute a cause of action and moved to dismiss the same.

Whereupon, on the 10th day of March, 1892, the following order was duly made and entered:

"*i.*"

THE CITY COUNCIL OF CHARLESTON
vs.
DORIS WERNER.

This case was called for trial on March 8th, 1892. Mr. Charles Inglesby, plaintiff's attorney, read the complaint; whereupon Mr. T. M. Mordecai, representing the defendant, orally demurred to the complaint, upon the ground that it does not state facts sufficient to constitute cause of action. After hearing full argument from counsel I am of the opinion that the complaint does state facts sufficient to constitute a cause of action, and therefore it is ordered, adjudged, and decreed that the said demurrer be overruled. * * *

10th March, 1892.

And be it further remembered that upon the 20th day of March, 1892, the defendant, Doris Werner, served and filed the following notice of appeal and exceptions:

14 "*j.*"

To Charles Inglesby, Esq., plaintiff's attorney:

Please take notice that the defendant, Doris Werner, intends to appeal and does hereby appeal to the supreme court of this State from the order of his honor Judge Kershaw, dated March 10th, 1892, overruling the oral demurrer made by the defendant and refusing to dismiss the complaint herein upon the following grounds, to wit, and upon such grounds and exceptions will move the supreme court to reverse the same, and for the purpose of such appeal the defendant takes the following exceptions:

I. Because the complaint in this action does not state facts sufficient to constitute a cause of action and the court should have so held.

II. Because the oral demurrer should have been sustained upon the ground that sections 227 and 228 of the Revised Ordinances of the city of Charleston of the 26th day of September, 1882, are in violation of and in contravention to fifth amendment to the Constitution of the United States, as well as section 23 of article I of the constitution of South Carolina, because said sections authorize a personal judgment against this defendant as the alleged owner of

the lot described in the complaint for the cost of this alleged improvement.

III. Because the oral demurrer should have been sustained, in that the act of the General Assembly of the State of South Carolina entitled "An act to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases, and for other purposes," ratified December 18th, 1830, as well as the act of the General Assembly of the State of South Carolina entitled "An act to amend an act entitled An act to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases, and for other purposes," ratified the 19th day of December, 1883, and each and both are in violation of and
15 in contravention to fifth amendment to the Constitution of the United States, as well as section 23 of article I of the constitution of South Carolina.

IV. Because the oral demurrer should have been sustained, in that it appears upon the face of the complaint that the cost of the alleged improvement was not apportioned among all the property-owners of the special taxing district, and that there was no system of apportionment whatever.

V. Because the said sections of the Revised Ordinances of the city of Charleston are *ultra vires* and void, in that no provision is made in said sections of said ordinance for condemning the land should the cost of the proposed improvement exceed one-half of the value of the land.

MORDECAI & GADSDEN,
Defendant's Attorneys.

We hereby agree, for the purposes of this appeal, that the foregoing shall constitute the case for the supreme court, and that the same may be filed in lieu of formal return and settled case as required by the rules and practice of the court, and that no further papers need be filed either in the circuit or supreme court.

May, 1892.

CHARLES INGLESBY,
Plaintiff's Attorney.
MORDECAI & GADSDEN,
Defendant's Attorneys.

[Endorsed:] Supreme court of South Carolina, clerk's office, Columbia, S. C. Filed May 19th, 1892. Albert M. Boozer, clerk.

16 And thereafter, to wit, at the November term, 1892, of the supreme court of the State of South Carolina, this cause was duly docketed for hearing.

And be it further remembered that on the 13th day of December, 1892, the cause having been regularly reached and called for in its order upon the calendar of the first circuit of the November term, 1892, of the supreme court of the State of South Carolina, the following proceedings were had:

Supreme Court Journal Entries.

STATE OF SOUTH CAROLINA:

In the Supreme Court, November Term, 1892.

TUESDAY, *Dec. 13th.*

Court convened 11 a. m. in the supreme court room, at the city of Columbia, S. C., pursuant to adjournment.

THE CITY COUNCIL OF CHARLESTON, Plaintiff, Respondent,
vs.
DORIS WERNER, Defendant, Appellant.

Cause called; cause argued.
Mr. P. H. Gadsden, for defendant, appellant.
Mr. W. C. Miller, for plaintiff, respondent.
Submitted and taken under advisement.

And be it further remembered that on the 21st day of March, 1893, the following opinion and order of the court was duly filed in the supreme court of the State of South Carolina in the following words and terms, to wit:

17 "*k.*"

THE STATE OF SOUTH CAROLINA:

In the Supreme Court, November Term, 1892.

THE CITY COUNCIL OF CHARLESTON
vs.
DORIS WERNER.

Opinion.

McGOWAN, *A. J.:*

This is an action by The City Council of Charleston to recover from the defendant, Doris Werner, the amount paid by the city council for filling up a low lot in the city, the property of the said defendant, which said lot or portion thereof had been inspected by the "board of health," determined to be a nuisance dangerous to the public health, and ordered to be filled. The defendant having been notified, as required by law, to fill the said lot and having failed so to do, the same was filled by the city authorities, and the present action is for the recovery of the cost of the said filling, viz., for 1,503 cubic yards of earth, at an expense of $1,157.10, which has been paid out of the city treasury. The plaintiff alleges that no part thereof has been paid by the said defendant, and that said sum does not exceed "one-half the value of defendant's said lot of land."

Whereupon plaintiff demands judgment against the said defendant for the said sum of $1,157.10, with interest and costs.

When the complaint was read the defendant, by her counsel, in-

terposed a verbal demurrer and moved to dismiss the complaint for the reason that it did not state facts sufficient to constitute a cause of action. His honor Judge Kershaw overruled the demurrer, and the defendant apeals to this court upon the following exceptions (the complaint in full should appear in the case):

First. Because sections 227 and 228 of the Revised Ordinances of the city of Charleston (September 26, 1882) are in violation
18 of the 5th amendment of the Constitution of the United States, as well as section 23, article I, of the Constitution of South Carolina, because said sections authorize a personal judgment against the defendant as the alleged owner of the lot described in the complaint, &c.

Second. Because the act of the General Assembly of the State of South Carolina "to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases, and for other purposes," &c. (December 18, 1830), as well as the act to amend the same (December 19, 1883), and each and both are in violation of and in contravention to the 5th amendment to the Constitution of the United States, as — section 23 of article I of the constitution of the State of South Carolina.

Third. Because the oral demurrer should have been sustained, in that it appears upon the face of the complaint that the cost of the alleged improvement was not apportioned among all the property-owners of the special taxing district, and that there was no system of apportionment whatever.

Fourth. Because the said sections of the Revised Ordinances of the city of Charleston are "*ultra vires*" and void, in that no provision is made in said sections for condemning the land should the cost of the proposed improvement exceed one-half of the value of the land.

There seems to be some misapprehension as to the nature and object of this proceeding. Reference is made to the "alleged improvement" and "the apportionment" of the costs among all the property-owners of the "special taxing district." This clearly refers to the principles applicable to a local tax for the purpose of making improvements, such as paving a street or opening one; but, as we understand it, this is not a matter of taxation at all, either general or local. The object of this proceeding is, not to raise money to support the city government or to improve the value of property in a particular locality (which may, however, be incidentally the result), but to put in operation the police power granted to the city council for the purpose of preserving the health of the city.

19 It is the machinery provided for enforcing the law against nuisances which menace the health of the public. "A law which might be invalid as an exercise of the right to tax for revenue might be sustainable where its purpose was the promotion of the general public health or morals. In exercising the power of taxation no discriminations are to be made, while in the exercise of police power the State is ordinarily to be governed only by considerations of what is for the public welfare." 18 A. & E. Encyc. Law, page 544 and notes. We must not therefore confound an

exercise of the police power with the nice distinctions which belong to the doctrine of taxation for local improvements.

In 1793 the city council of Charleston was incorporated with the usual police powers. (7 Statutes, 97.)

In 1830 the charter was amended, giving expressly the following police powers: "That whenever the city council of Charleston shall be of opinion that any lots or grounds within the city belonging to any person or persons, &c., are in a state of nuisance or so situated that in warm or unhealthy seasons a nuisance may thereby be created and the health of the city endangered, or whenever the land or streets in the vicinity of said lots may become liable to injury therefrom, the city council, &c., shall have full power and authority to cause a notice to be served on the owner of such lots or grounds, directing him or them to have the same filled up to such extent, in such manner, with such materials, and within such reasonable time as may be prescribed in such notice, and in case the owner of such lot shall neglect or refuse to fill up said lots that the said city council are hereby authorized and empowered to have such lots filled up," &c.

"II. All expenses or charges paid or incurred by the said council in case such lots shall be filled up under their authority shall and may be recovered in an action of debt against the owner or owners of such lots or grounds, provided the said expenses or charges do not exceed more than half the value of said lots or grounds," &c.

In 1839 the city council passed an ordinance containing two sections in conformity with the above act, which in 1882 were re-enacted in the Revised Ordinances as sections 227 and 228.

In 1883 the General Assembly again amended the charter by adding the following words: "Provided, however, that if the estimated expenses and charges of filling said lots shall exceed more than one-half the value thereof, then and in that event the said city council shall have power and authority to condemn the said lots, and upon paying to the owner or owners the price that may be fixed therefor, as hereinafter provided, the title thereof shall rest in the said city council of Charleston," &c.

It will be observed that the complaint recites sections 227 and 228 of the Revised Ordinances of the city, which are in exact conformity to the terms of the act of 1830, and if that act is constitutional it is difficult to see the point made by the last ground of appeal, that "the said sections of the Revised Ordinances are *ultra vires* and void, in that no provision is made in said sections of said ordinances for condemning the land should the cost of the proposed 'improvement' exceed one-half of the value of the land," &c. The right to condemn the land and pay for it is mentioned for the first time in the amendment of 1883, which was long after the said sections of the ordinance were passed, and that right to condemn was given only in the event that the charge of filling the lots "shall exceed more than one-half the value thereof." This was not a case falling in that category, for the complaint alleged distinctly "that the said sum of $1,157.10 does not exceed one-half the value of defendant's lot of land," &c. The oral demurrer for the purposes of the issue made

by it admitted that fact, and therefore it was not necessary to make that point under the amendment of 1883, which did not cover the case, and the matter stood precisely as if that act had never been passed. As urged for the plaintiff, "in the amendment of 1883 we have no express provision for but an unmistakable exclusion of such a case as the present."

Then the only question in the case is whether the act of 1830, amending the charter of the city council of Charleston, is
21 constitutional or not. The State through the law-making body, certainly possesses the police power, which from its very nature has no well-defined limits, but must be as extensive as the necessities which call for its exercise. Although not clearly defined, it is an extensive power, distinguished not only from the power of taxation, but also from that of eminent domain, and in its widest sense is said to be the general power of a government to preserve and promote the general welfare even at the expense of private rights. "It is difficult, if not impossible, to define the exact scope of the term. The Supreme Court of the United States have declined to do so, stating that they would only determine such case as it arose." Stone *vs.* Mississippi, 101 U. S. R., 814, and 18 A. & E. Enc*l*yclopedia of Law, page 740 and notes. The title of the act in question was "to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases," &c. Its whole exclusive purpose was to promote and secure the health of the city of Charleston, and it would be difficult to conceive of a clearer case of the exercise of the police power. "Health being the *sine qua non* of all personal enjoyment, it is not only the right, but the duty, of the State to pass such laws as may be necessary for the preservation of the health of the people. For this purpose a State may compel the clearing and drainage of lands which might otherwise create malarial or other diseases, or provide in any other reasonable way for the preservation of the public health," &c. (See The Council *vs.* Baptist Church, 4 Strob. Law, 307; R. R. Co. *vs.* Gibbes, treasurer, 24 S. C., 472; Town Council *vs.* Pressley, 33 S. C., 56; 18 A. & E. Encyclopedia, page 750 and notes.) We have no doubt that the amending act of 1830 was constitutional and that the General Assembly had the right to delegate the police power to the city council of Charleston.

The judgment of this court is that the judgment of the circuit court be affirmed.

McIver, C. J., and Pope, A. J., concur.

22 And be it further remembered that the said defendant, appellant, Doris Werner, did, upon the 24th day of April, 1893, file in the office of the clerk of the supreme court of the State of South Carolina a motion that the clerk of said court be instructed and required to file with the *clerk* in said cause a certificate certifying that a Federal question was necessarily involved in the decision of said cause, and that said Federal question was actually decided by said supreme court in its determination of said action; which said motion, together with the order of said supreme court

allowing and granting said motion, *are* in the following words and terms, to wit:

23 "*l.*"

STATE OF SOUTH CAROLINA:

In the Supreme Court.

Appeal from first circuit.

THE CITY COUNCIL OF CHARLESTON, Plaintiff, Respondent,
vs.
DORIS WERNER, Defendant, Appellant.

To the honorable the chief justice and associate justices of the supreme court of the State of South Carolina:

Now comes the above-named defendant, appellant, Doris Werner, by Mordecai & Gadsden, her attorneys, and moves the court that a certificate be granted by this court, and that the clerk of this court be instructed and directed to file with the record in this case a certificate to the effect that the question was presented to this court in the above-entitled action that the act of the General Assembly of the State of South Carolina entitled "An act to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases, and for other purposes," ratified December 18th, 1830, and sections 227 and 228 of the Revised Ordinances of the city of Charleston of the 26th day of September, 1882, are in violation of and in contravention to the fifth amendment of the Constitution of the United States, and that the decision of said questions by this court is necessary to the determination of said action, and that said questions were actually decided in this court in its determination of said action.

Dated 24th April, 1893.

MORDECAI & GADSDEN,
Attorneys for Doris Werner, Defendant, Appellant.

24 "*m.*"

STATE OF SOUTH CAROLINA:

In the Supreme Court.

THE CITY COUNCIL OF CHARLESTON, Plaintiff, Respondent,
vs.
DORIS WERNER, Defendant, Appellant.

The foregoing motion having been presented in open court, it is hereby ordered that the clerk of this court be, and is hereby, directed and instructed to make a certificate under the seal of this court and to file the same with the record in this case, and that said certificate shall be to the effect that in said action a Federal question was presented for decision to this court, to wit, the question as to whether the act of the General Assembly of the State of South Carolina, entitled "An act to authorize the city council of

Charleston to fill up low lots and grounds in the city of Charleston in certain cases, and for other purposes," ratified December 18th, 1830, and sections 227 and 228 of the Revised Ordinances of the city of Charleston of the 26th day of September, 1882, are in violation of and in contravention to the fifth amendment of the Constitution of the United States; that said act of the General Assembly and said sections of said Revised Ordinances were claimed by the said Doris Werner, defendant, appellant, both in the court below as well as in this court, to be in conflict with the fifth amendment of the Constitution of the United States, and that the decision of this court was in favor of the validity of both said act and ordinances, and that the decision of said question was necessary to the determination of this action in this court, and that said question was actually decided by this court in the decision made by it in said action, and that the judgment in said action as rendered in this court could not have been given without deciding this question.

Dated Charleston, S. C., April 24th, 1893.

HENRY McIVER,
Chief Justice of the Supreme Court of South Carolina.

25 Endorsed: Motion and order. Supreme court, State of South Carolina, clerk's office, Columbia, S. C. Filed April 24th, 1893. Albert M. Boozer, clerk.

Whereupon, on said 24th day of April, A. D. 1893, the clerk of the supreme court of the State of South Carolina did make and file in his said office a certificate as required by said order; which said certificate is hereto annexed and transmitted herewith:

26 "*n.*"

STATE OF SOUTH CAROLINA:

In the Supreme Court.

THE CITY COUNCIL OF CHARLESTON, Plaintiff, Respondent,
vs.
DORIS WERNER, Defendant, Appellant.

I, Albert M. Boozer, clerk of the supreme court, of the State of South Carolina, do hereby certify that upon the 24th day of April, 1893, the following order was entered by the supreme court of the State of South Carolina in the above-entitled action, to wit:

"The foregoing motion having been presented in open court, it is hereby ordered that the clerk of this court be, and is hereby, directed and instructed to make a certificate under the seal of this court and to file the same with the record in this case, and that said certificate shall be to the effect that in said action a Federal question was presented for decision to this court, to wit, the question as to whether the act of the General Assembly of the State of South Carolina entitled 'An act to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases, and for

other purposes,' ratified December 18th, 1830, and sections 227 and 228 of the Revised Ordinances of the city of Charleston of the 26th day of September, 1882, are in violation of and in contravention to the fifth amendment of the Constitution of the United States; that said act of the General Assembly and said sections of said Revised Ordinances were claimed by the said Doris Werner, defendant, appellant, both in the court below as well as in this court, to be in conflict with the fifth amendment of the Constitution of the United States, and that the decision of this court was in favor of the validity of both said act and ordinances, and that the decision of said question was necessary to the determination of this action in this
27 court, and that said question was actually decided by this court in the decision made by it in said action, and that the judgment in said action as rendered in this court could not have been given without deciding this question."

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of South Carolina this 24th day of April, 1893.

[Seal Supreme Court, State of South Carolina.]

ALBERT M. BOOZER,
Clerk of the Supreme Court of the State of South Carolina.

Endorsed: State of South Carolina. Supreme court. Appeal from first circuit. The City Council of Charleston, plaintiff, respondent, *vs.* Doris Werner, defendant, appellant. Certificate of Federal question. Mordecai & Gadsden, att'ys for appellant. Supreme court of South Carolina, clerk's office, Columbia, S. C. Filed April 24th, 1893. Albert M. Boozer, clerk.

28 And be it further remembered that the said Doris Werner, plaintiff in error, did, upon the 24th day of April, 1893, file in the office of the clerk of the supreme court of the State of South Carolina her petition for a writ of error from the final decision of the said supreme court in said cause, together with the order of the Honorable Henry McIver, chief justice of the supreme court of the State of South Carolina, allowing said writ of error, and, together with her assignment of error in said cause; which said petition, order, and assignment of errors are in the following words and terms, to wit:

29 "*o.*"

STATE OF SOUTH CAROLINA:

In the Supreme Court.

THE CITY COUNCIL OF CHARLESTON, Plaintiff, Respondent,
vs.
DORIS WERNER, Defendant, Appellant.

To the honorable the chief justice and associate justices of the supreme court of the State of South Carolina:

Now comes your petitioner, Doris Werner, the defendant, appellant, in the above-entitled action, and petitions for a writ of error from

the final decision of the supreme court of the State of South Carolina in the above-entitled action, heretofore made upon the 21st day of March, 1893, and shows that on the 10th day of March, 1892, in the court of common pleas for the county of Charleston, State of South Carolina, in the above-entitled cause, the defendant having orally demurred to the complaint therein upon the ground that it did not state facts sufficient to constitute a cause of action, and after hearing full argument from counsel, the presiding judge of said court, being of the opinion that the complaint did state facts sufficient to constitute a cause of action, did thereupon order, adjudge, and decree that the said demurrer be overruled, and that thereupon and in due time your petitioner, defendant, appellant, served and filed notice of appeal and exceptions, the chief grounds of error on said appeal complained of by your petitioner being—

I. Because the complaint in this action does not state facts sufficient to constitute a cause of action, and the court should have so held.

II. Because the oral demurrer should have been sustained upon the ground that sections 227 and 228 of the Revised Ordinances of the city of Charleston of the 26th day of September, 1882, are in violation of and in contravention to fifth amendment to the Constitution of the United States, as well as section 23 of article 1 of the constitution of South Carolina, because said sections authorize a personal judgment against this defendant, as the alleged owner of the lot described in the complaint, for the cost of this alleged improvement.

III. Because the oral demurrer should have been sustained, in that the act of the General Assembly of the State of South Carolina entitled "An act to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases, and for other purposes," ratified December 18th, 1830, as well as the act of the General Assembly of the State of South Carolina entitled "An act to amend an act entitled An act to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases, and for other purposes," ratified the 19th day of December, 1883, and each and both are in violation of and in contravention to fifth amendment to the Constitution of the United States, as well as section 23 of article I of the constitution of South Carolina.

IV. Because the oral demurrer should have been sustained, in that it appears upon the face of the complaint that the cost of the alleged improvement was not apportioned among all the property-owners of the special taxing district, and that there was no system of apportionment whatever.

V. Because the said sections of the Revised Ordinances of the city of Charleston are *ultra vires* and void, in that no provision is made in said sections of said ordinance- for condemning the land should the cost of the proposed improvement exceed one-half of the value of the land.

And your petitioner hereto annexed and makes a part of this petition the act of the General Assembly of the State of South Carolinia,

ratified December 18th, 1830, hereinbefore referred to, and sections 227 and 228 of the Revised Ordinances of the city of Charleston of the 26th day of September, 1892, marked Exhibits "A" and "B" respectively and attached hereto.

Your petitioner shows that said judgment of the supreme
31 court of the State of South Carolina in the said action is a final judgment in said suit in the highest court of said State of South Carolina in which a decision in said suit can be had, and that in said suit there was drawn in question the validity of a statute of said State of South Carolina, to wit, "An act to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases, and for other purposes," ratified December 18th, 1830, and of certain sections of the Revised Ordinances of the city of Charleston, to wit, sections 227 and 228, on the ground that said act and ordinances, being repugnant to the Constitution of the United States, to wit, the fifth amendment to the said Federal Constitution, and that the decision aforesaid of the supreme court of the State of South Carolina is in favor of the validity of said statute and ordinances, all of which will more fully appear from the record in said suit now on file in the office of the clerk of this court, and to which record reference is hereby made.

And your petitioner further shows that said act of the General Assembly of the State of South Carolina, entitled "An act to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases, and for other purposes," ratified December 18th, 1830, and sections 227 and 228 of the Revised Ordinances of the city of Charleston of the 26th day of September, 1882, are in violation of and in contravention to the fifth amendment of the Constitution of the United States.

Wherefore your petitioner prays that a writ of error be issued in said suit from the Supreme Court of the United States to the supreme court of the State of South Carolina to review said judgment in the supreme court of the State of South Carolina in accordance with law and with the usage, custom, and practice of the Supreme Court of the United States; and this petitioner will ever pray.

DORIS WERNER.

MORDECAI & GADSDEN,
Attorneys for Doris Werner, Petitioner.

32 STATE OF SOUTH CAROLINA, }
Charleston County, } *ss:*

Doris Werner, being first duly sworn, deposes and says that she is the same Doris Werner who is the petitioner in the foregoing petition for a writ of error; that she has read the foregoing petition and knows the contents thereof, and that the facts therein set up are true.

DORIS WERNER.

Sworn to and subscribed before me this 20th day of April, 1893.
[SEAL OF OFFICE.] JACOB WILLIMAN,
Notary Public, S. C.

33 EXHIBIT "A."

"An act to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston, in certain cases, and for other purposes."

SECTION 1. Be it enacted, That whenever the city council of Charleston shall be of opinion that any lots or grounds within the city of Charleston, belonging to any person or persons, body or bodies corporate, are in a state of nuisance, or so situated that in warm unhealthy seasons a nuisance may thereby be created, and the health of the citizens endangered; or, whenever the land or streets in the vicinity of said lots may become liable to injury therefrom; the city council of Charleston shall have full power and authority to cause a notice to be served on the owner or owners of such lots or grounds, directing him or them to have the same filled up to such extent, and in such manner, with such materials, and within such reasonable time, as may be prescribed in such notice; and in case the owner or owners of such lots or grounds in conformity with said notice, that then the said city council are hereby authorized and empowered to have such lots and grounds filled up to such extent, and in such manner, as they may think fit.

SEC. 2. All expenses and charges paid or incurred by the said city council, in case such lots or grounds shall be filled up under their authority and direction, as aforesaid, shall and may be recovered, with interest and cost of suit, in an action of debt, to be brought by said city council in the court of common pleas, against the owner or owners of such lots or grounds: Provided, the said expenses and charges do not exceed more than one-half the value of said lots or grounds.

34 EXHIBIT "B."

SECTION 227. Whenever it shall appear to the board of health that any low lots or vacant grounds are in a condition to injure or endanger the public health, it shall be the duty of the said board of health to appoint a board of inspection to be composed of the city registrar and four members of the board of health (any three of whom shall be a quorum), whose duty it shall be to enter upon and thoroughly examine such lots or vacant grounds, and determine by the vote of not less than three of the said board whether such lots or vacant grounds shall be drained, filled up, levelled or otherwise so improved, as to remove the nuisance and evil there complained of or existing. And should the said board of inspection be of opinion that such lots or vacant grounds ought to be filled up, levelled or drained, they shall submit a detailed report to the city council, setting forth the actual condition thereof, and suggesting the mode, materials, and extent to which such low lots or vacant grounds shall be filled up, levelled or drained; upon which report council shall take such order and direction thereon as they may deem expedient.

SEC. 228. In case council shall order the report of said board of inspection, made as aforesaid, to be carried into effect, or shall direct such low lots to be filled up, levelled or drained, it shall be the duty of the city registrar to serve a notice, in writing, on the owner or owners of such low lots or vacant grounds, directing said owner or owners to have such lots or vacant grounds filled up, levelled or drained, as council may require, to such extent, in such manner, with such materials, and within such reasonable time as may be prescribed by the said order of the city council. And, in case of neglect or refusal of such owner or owners to obey said notice, it shall be the duty of the city registrar to cause such lots or grounds to be filled up, levelled or drained in the manner prescribed in the said notice under the order and direction of the said board of inspection. The expenses and charges paid and incurred in case such lots or grounds shall be filled up, levelled or drained, under the order of the board of inspection shall be paid in the first instance out of the city treasury, and shall afterwards be recovered, with interest and costs of suit, in an action of debt, to be brought by council in the court of common pleas against the owner or owners of such lots or grounds. The city engineer shall, whenever required, attend the said board of inspection on the examination of low lots and grounds, and under their direction make plans for filling, levelling and draining the same.

"*p.*"

STATE OF SOUTH CAROLINA:

In the Supreme Court.

THE CITY COUNCIL OF CHARLESTON, Plaintiff, Respondent,
vs.
DORIS WERNER, Defendant, Appellant.

Desiring to give the petitioner an opportunity to test in the Supreme Court of the United States the question presented in the foregoing petition—

It is hereby ordered that a writ of error be and is hereby allowed to said court, and that the same be made a supersedeas—a bond in the penal sum of five hundred dollars ($500.00) herewith presented being approved.

In witness whereof I have hereunto set my hand this 24th day of April, 1893.

HENRY McIVER,
Chief Justice of the Supreme Court
of the State of South Carolina.

37 "*q*."

In the Supreme Court of the United States.

STATE OF SOUTH CAROLINA:

DORIS WERNER, Plaintiff in Error,
vs.
CITY COUNCIL OF CHARLESTON, Defendant in Error.

Now comes the said plaintiff in error, the said Doris Werner, by Mordecai & Gadsden, her attorneys, and makes this her assignment of error in the above-entitled action and assigns and specifies the following as errors committed upon the trial of said action:

I. The court erred in overruling the oral demurrer of plaintiff in error to the complaint in said action.

II. Because the court erred in holding that sections 227 and 228 of the Revised Ordinances of the city of Charleston of the 26th day of September, 1882, are not in violation of and in contravention to the fifth amendment to the Constitution of the United States, even though said sections authorize a personal judgment against this plaintiff in error, as the alleged owner of the lot described in the complaint, for the costs of this alleged improvement.

III. Because the court erred in holding that the act of the General Assembly of the State of South Carolina entitled "An act to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases, and for other purposes," ratified December 18th, 1830, was not in violation of and in contravention to the fifth amendment to the Constitution of the United States.

IV. Because the court erred in holding that the act of the General Assembly of the State of South Carolina entitled "An act to amend an act entitled 'An act to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in cer-
38 tain cases, and for other purposes,'" ratified 19th day of December, 1883, did not apply to or effect the case under consideration.

V. Because the court erred in overruling the demurrer of the plaintiff in error, notwithstanding that it appeared upon the face of the complaint that the cost of the alleged improvement was not apportioned among the property-owners of the several taxing districts, and that there was no system of apportionment whatsoever.

VI. Because the court erred in holding that the said sections 227 and 228 of the Revised Ordinances of the city of Charleston were neither *ultra vires* nor void, notwithstanding that there was no provision made in said section of said ordinances for condemning the land should the cost of the proposed improvement exceed one-half of the value of the land.

And for a further assignment of error the said plaintiff in error alleges:

I. That the supreme court of the State of South Carolina erred in confirming the judgment of the circuit court for the county of

Charleston overruling the oral demurrer to the complaint interposed by the plaintiff in error.

II. That the supreme court of the State of South Carolina erred in holding that the act of the General Assembly of the State of South Carolina entitled "An act to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases, and for other purposes," ratified December 18th, 1830, constitutional.

III. That the supreme court of the State of South Carolina erred in holding that the said act of the General Assembly of the State of South Carolina, to wit, "An act to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases, and for other purposes," ratified December 18th, 1830, was not repugnant to the fifth amendment to the Constitution of the United States.

39 IV. That the supreme court of the State of South Carolina erred in holding sections 227 and 228 of the Revised Ordinances of the city of Charleston of the 26th day of September, 1882, constitutional, notwithstanding that there was no provision made in said section of said ordinances for condemning the land should the cost of the proposed improvement exceed one-half of the value of the land.

V. That the supreme court of the State of South Carolina erred in holding that sections 227 and 228 of the Revised Ordinances of the city of Charleston of the 26th day of September, 1882, were not repugnant to, in violation of, and in contravention to the fifth amendment to the Constitution of the United States, notwithstanding that there was no provision made in said section of said ordinance for condemning the land should the cost of the proposed improvement exceed one-half of the value of the land.

VI. That the supreme court of the State of South Carolina erred in holding that the act of the General Assembly of the State of South Carolina entitled "An act to amend an act entitled 'An act to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases and for other purposes,'" ratified December 18th, 1883, had no application to the case under consideration.

VII. That the supreme court of the State of South Carolina erred in affirming the judgment entered against the plaintiff in error, to wit, overruling his oral demurrer to the complaint by the circuit court of the county of Charleston, in the State of South Carolina, for the reason that the statute of the State of South Carolina under which the complaint in this case is drawn, to wit, "An act of the General Assembly of the State of South Carolina entitled 'An act to authorize the city council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases, and for other purposes,'" ratified December 18th, 1830, as well as sections 227 and 228 of the Revised Ordinances of the city of Charleston of the 26th day of September, 1882, are unconstitutional, in that
40 both the act and ordinance are in conflict with the fifth amendment to the Constitution of the United States.

Wherefore the said plaintiff in error, Doris Werner, by Mordecai & Gadsden, her attorneys, petitions and prays your honorable court that for reason of the errors hereinbefore specified and set forth the judgment entered in said action by the supreme court of the State of South Carolina overruling the oral demurrer of the plaintiff in error to the complaint herein be reversed; and this your petitioner will ever pray.

MORDECAI & GADSDEN,
Attorneys for Petitioner.

41 Endorsed: State of South Carolina. In the supreme court. Appeal from first circuit. The City Council of Charleston, plaintiff, respondent, *vs.* Doris Werner, defendant, appellant. Petition and order for writ of error and assignment of error. Mordecai & Gadsden, attorneys for defendant, appellant. Supreme court of South Carolina, clerk's office, Columbia, S. C. Filed April 24th, 1893. Albert M. Boozer, clerk. Filed 24th April, 1893. J. E. Hagood, C. C. C. U. S., dist. S. C.

42 And be it further remembered that the said plaintiff in error, Doris Werner, did upon the 24th day of April, A. D. 1893, file in the office of the clerk of the supreme court of the State of South Carolina her bond on writ of error; which said bond was upon the 24th day of April, 1893, duly approved by the Honorable Henry McIver, chief justice of the supreme court of the State of South Carolina, and which said bond, with the order of approval endorsed thereon, was in the following words and terms, to wit:

43 "*r.*"

STATE OF SOUTH CAROLINA:

In the Supreme Court of the State of South Carolina.

THE CITY COUNCIL OF CHARLESTON, Plaintiff, Respondent,
vs.
DORIS WERNER, Defendant, Appellant.

Know all men by these presents that we, Doris Werner, as principal, and John F. Werner and F. D. C. Kracke, as sureties, are held and firmly bound unto the City Council of Charleston in the penal sum of five hundred dollars ($500.00), to be paid to the said City Council of Charleston; to which payment, well and truly to be made and done, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 22nd day of April, in the year of our Lord one thousand eight hundred and ninety-three.

The condition of the above obligation is such that whereas the above-named Doris Werner has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of South Carolina:

Now, therefore, the condition of this obligation is such that if the above-named Doris Werner shall prosecute her said writ of error to effect and answer all damages and costs if she should fail to make good her plea, then this obligation to be void and of none effect; otherwise it shall be and remain in full force and virtue.

DORIS WERNER. [L. S.]
JOHN F. WERNER. [L. S.]
F. D. C. KRACKE. [L. S.]

Signed, sealed, and delivered in the presence of—
LAWRENCE E. ROBERTS.
T. MOULTRIE MORDECAI.

44 STATE OF SOUTH CAROLINA, }
Charleston County. }

Personally appeared before me, T. Moultrie Mordecai, who, being duly sworn, says that he was present and saw the within-named Doris Werner, John F. Werner, and F. D. C. Kracke sign, seal, and as their respective act and deed deliver the above-written deed, and that he, with Lawrence E. Roberts, witnessed the due execution thereof.

T. MOULTRIE MORDECAI.

Sworn to and subscribed before me this 22nd day of April, A. D. 1893.

JACOB WILLIMAN,
[SEAL OF OFFICE.] *Notary Public, S. C.*

STATE OF SOUTH CAROLINA, }
Charleston County. }

Jno. F. Werner and F. D. C. Kracke, being each first duly sworn, each for himself on his oath deposes and says that he is one of the sureties named in the foregoing obligation; that he is a resident, citizen, and freeholder of the city of Charleston, in the county of Charleston and State of South Carolina; that he is worth the sum of five hundred dollars ($500.00) in property within the said State of South Carolina over and above all of his debts and liabilities and property within the said State of South Carolina not by law exempt from execution.

JOHN F. WERNER.
F. D. C. KRACKE.

Sworn to and subscribed before me this 22nd day of April, 1893.

JACOB WILLIMAN,
[SEAL OF OFFICE.] *Notary Public, S. C.*

I hereby approve the foregoing as good and sufficient security this 24th day of April, 1893.

HENRY McIVER,
Chief Justice Supreme Court of the State of South Carolina.

45 Endorsed: State of South Carolina. In the supreme court. Appeal from first circuit. The City Council of Charleston, plaintiff, respondent, *vs.* Doris Werner, defendant, appellant. Writ of error bond. Mordecai & Gadsden, attorneys for defendant, appellant. Supreme court of South Carolina, clerk's office, Columbia, S. C. Filed April 24th, 1893. Albert M. Boozer, clerk.

46 "*s.*"

STATE OF SOUTH CAROLINA:

I, Albert M. Boozer, clerk of the supreme court of the State of South Carolina, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript of the record, proceedings, and exhibits in the case of The City Council of Charleston, defendant in error, against Doris Werner, plaintiff in error, as fully as the same remains on file and of record in said case in my office.

In witness whereof I have hereunto subscribed my name and affixed the seal of the said supreme court of the State of South Carolina, at my office, at the seat of government of the said State of South Carolina, at Columbia, in the said State of South Carolina, this 17th day of May, A. D. 1893.

ALBERT M. BOOZER,
Clerk of the said Supreme Court of the State of South Carolina.

[Seal Supreme Court of South Carolina.]

Endorsed on cover: Case No 15,325. South Carolina supreme court. Term No., 941. Doris Werner, plaintiff in error, *vs.* The City Council of Charleston. Filed May 24th, 1893.

Office Supreme Court, U. S.
+FILED+
JAN 13 1894
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

No 941.

DORIS WERNER, PLAINTIFF IN ERROR,

vs.

THE CITY COUNCIL OF CHARLESTON.

MOTION TO QUASH THE WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

CHARLES INGLESBY,
Counsel for Appellee.

CHARLESTON, S. C.
WALKER, EVANS & COGSWELL CO., PRINTERS,
Nos. 3 and 5 Broad and 117 East Bay Streets.
1893.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

No 941.

DORIS WERNER, PLAINTIFF IN ERROR,

vs.

THE CITY COUNCIL OF CHARLESTON.

MOTION TO QUASH THE WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

Comes now the appellee, by its counsel appearing in that behalf and moves the Court to quash the writ of error in the above entitled cause for want of jurisdiction, upon the grounds—

1st. That the decree brought here by writ of error is not a final decree.

2d. That there is no Federal question involved, and

3d. That even if the law involved in the decision, might raise a Federal question, the judgment of the Supreme Court of South Carolina was based upon an independent ground, to-wit: the police power of the State.

CHARLES INGLESBY,
Counsel for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES—OCTOBER TERM, 1893.

No. 941.

To Messrs. Mordecai & Gadsden, Counsel for Appellants:

Please take notice that on Monday, the 8th day of January, A. D. 1894, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon. Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

CHARLES INGLESBY,
Counsel for Appellee.

STATEMENT.

The judgment brought here by writ of error for review, is a judgment of the Supreme Court of the State of South Carolina, which simply affirmed a decision of the lower Court overruling a demurrer, and thereby remanded the case to the Court below for a hearing on the merits. It is therefore an interlocutory judgment and is in no sense a final decree.

ARGUMENT.

FIRST GROUND.

To give this Court jurisdiction, the decree must be final, it "must terminate the litigation between the parties "on the merits of the case, so that if there should be an "affirmance here, the Court below would have nothing to "do but to execute the judgment or decree it had already "rendered."

Bostwick vs. Brinkerhoff, 106 U. S., 3, and authorities there cited.

Rutherford *et al* v. Fisher, 4 Dall., 22.

Houston v. Moore, 3 Wheat, 433, and cases there cited.
Kimball v. Evans, 93 U. S., 320.
Cosby v. Buchanan, 90 U. S., 453.
Green v. Fisk, 103 U. S., 518.
Grant v. Phœnix Ins. Co., 106 U. S., 429.
St. L. I. M. & S. R. R. Co. v. Southern Ex. Co., 108 U. S, 24.
Evans v. Brown, 109 U. S, 180.
Mower v. Fletcher, 114 U. S., 127.
Jones v. Craig, 127 U. S., 214.

SECOND GROUND.

The only Federal question disclosed in the record (Folio 23) is, whether the A. A. of So. Ca. of 1830 (7 Stat. 144) entitled "An Act to authorize the City Council of Charleston to fill up low lots and grounds in the City of Charleston in certain cases," and the City Ordinances of Charleston passed pursuant to said Act, are violative of the 5th Amendment to the Constitution.

The 5th Amendment of the Constitution of the United States applies only to matters arising out of laws of the Federal Government, and does not apply to State legislation.

Barron v. Mayor of Balt., 7 Pet., 243.
Fox v. Ohio, 5 How., 434.
Twitchell v. Commonwealth, 7 Wall, 321.

THIRD GROUND.

The Record (Folios 18 and 21) shows that the judgment of the Supreme Court of South Carolina is based upon a ground which does not involve a Federal question; to wit: that the A. A. 1830 (*supra*) was not a tax Act or an Act for the purpose of making improvements, but was an Act passed under the police power of the State, a health law. In such case this Court will not take jurisdiction.

DeSaussure v. Gaillard, 127 U. S., 216.
Hammond v. Johnston, 142 U. S., 73.

CHARLES INGLESBY,
Attorney for Defdt in Error.

[redacted]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 941.

DORIS WERNER, PLAINTIFF IN ERROR,

vs.

CITY COUNCIL OF CHARLESTON.

BRIEF OF MESSRS. MORDECAI & GADSDEN FOR PLAINTIFF IN ERROR ON MOTION TO QUASH WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

STATEMENT.

The judgment brought here by writ of error for review is the judgment of the Supreme Court of the State of South Carolina holding that a certain Act of the General Assembly of the State of South Carolina, entitled "An Act to authorize the City Council of Charleston to fill up low lots and grounds in the City of Charleston in certain cases and for other purposes"—approved on the 18th of December, 1830, is not in violation of the Constitution of the United States, thereby affirming the judgment of the trial Court and so ending the Constitutional defense interposed by the plaintiff in error.

By an examination of the record it will be observed that upon the trial of the case in the Court below, page 8, the defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and the trial Court decreed that the demurrer should be overruled. The decree of the trial Court in effect ended the Constitutional defense unless this decision was reversed either by the Court of last resort of the State or by this Court. The Supreme Court of South Carolina affirmed the decision of the Court below and the case comes here for review on a writ of error. The argument in support of the motion to dismiss is predicated upon three grounds :

First. That the decree brought here by writ of error is not a final decree.

Second. That there is no Federal question involved, and

Third. That even if the law involved in the decision might raise a Federal question, the judgment of the Supreme Court of the State of South Carolina was based upon an independent ground, to wit: the Police power of the State.

ARGUMENT.

First. Is the decree brought here by writ of error a final decree?

An examination of the record will show that the constitutionality of the Act of 1830 is distinctly raised by the demurrer as well as in the grounds of appeal to the Supreme Court of the State, and in no other way, so far as the record discloses, has this question been made or could it be made in this cause. According to the practice prevailing in the State Courts of South Carolina, the plaintiff in error was obliged to raise the constitutional question by way of demurrer, and that being the only defence disclosed by the record and the judgment of the Court below being affirmed, the judgment of the Supreme Court of South Carolina was in fact and in effect a final judgment, so far as any defence on the constitutional ground was concerned.

It further appears from the certificate of the Chief Justice of the Supreme Court of South Carolina that this constitutional question was presented to that Court for consideration, and that its decision by said Court was necessary to the determination of this action in that Court, and that said question was actually decided by that Court in the decision made by it in said action, and that the judgment in said action as rendered in that Court could not have been given without deciding this question. The judgment of the Supreme Court of South Carolina was that the judgment of the Circuit Court be affirmed, and there was no remand of the case to the Court below for a hearing on the merits, so that the judgment was a final decree, and as such is subject to review in this Court.

Second. Is there a Federal question involved?

An examination of the record will show that the main ground of the demurrer interposed in the Court below by the plaintiff in error was the unconstitutionality of the Act of 1830. It was claimed both there and in the Court above, as well as in this Court, to be in violation of due process of law, but through a singular oversight in each tribunal the clerical error occurred of inserting the word "Fifth" when it was clearly intended to be "Fourteenth," the nature of the

two amendments being practically one and the same as far as "due process of law" was involved; therefore it is respectfully submitted that the Court will take jurisdiction of this case upon the ground of the unconstitutionality of the Act of 1830 as violative of the Fourteenth Amendment, the nature of which is "that no State shall deprive any person of life, liberty or property without due process of law, and it is respectfully submitted that the record in this case raises this question and that the record in this case discloses that it was claimed in the Appellate Court, as well as in this Court, that this Statute was assailed as not providing "due process of law" and that the clerical error of the mistaking of the numbering of the Amendment will not prevent this Court from considering the Constitutional question presented. Until the serving of the Appellees' brief, on motion to dismiss in this case the clerical error which had occurred in this case was not noticed and it is submitted that it is within the power of this Court under the circumstances to consider the question of the constitutionality of the Act of 1830.

Third. Was the judgment of the Supreme Court of South Carolina based upon an independent ground, or was a Federal question raised and decided in that Court?

For the purpose of determining this question let us examine first the decision of the Supreme Court of South Carolina, at page 13 we find as follows:

"Then, the *only* question in the case is whether the Act of 1830, amending the charter of the City Council of Charleston is Constitutional or not. The State, through the law-making body, certainly possesses the police power, which, from its very nature, has no well defined limits, but must be as extensive as the necessities which call for its exercise. Although not clearly defined, it is an extensive power, distinguished not only from the power of taxation, but also from that of eminent domain, and in its widest sense is said to be the general power of a government to preserve and promote the general welfare even at the expense of private rights. "It is difficult, if not impossible, to define the exact scope of the term. The Supreme Court of the United States have declined to do so, stating that they would only determine such case as it arose." Stone vs. Mississippi, 101 U. S., R. 814, and 18 A. and E. Encyclopedia Law, page 740 and notes. The title of the Act in question was "to authorize the City Council of Charleston to fill up low lots and grounds in the City of Charleston in certain cases, &c. Its whole exclusive purpose was to promote and secure the health of the City of Charleston, and it would be difficult to conceive of a clearer case of the exercise of the police power. "Health being the *sine qua non* of all personal enjoyment, it is not only the right but the duty of the State to pass such laws as may be necessary for the preservation of the health of the people. For this purpose a State may compel the clearing and drainage of lands in any other reasonable way for the preservation of the public health." &c. (See The Council vs. Baptist Church, 4 Strob, Law 307; R. R. Co. vs. Gibbes, treasurer, 24 S. C., 472; Town Council vs. Pressley, 33 S. C., 56; 18

A. and E. Encyclopedia, page 750 and notes.) We have no doubt that the amending Act of 1830 was Constitutional, and that the General Assembly had the right to delegate the police power to the City Council of Charleston. *The judgment of this Court is that the judgment of the Circuit Court be affirmed.*" And in confirmation we have, at page 15, the certificate of the Chief Justice of the Supreme Court of the State of South Carolina, as follows:

"The foregoing motion having been presented in open Court, it is hereby ordered that the Clerk of this Court be, and is hereby directed and instructed, to make a certificate under the seal of this Court, and to file the same with the record in this case, and that said certificate shall be to the effect that in said action a Federal question was presented for decision to this Court, to wit: the question as to whether the Act of the General Assembly of the State of South Carolina, entitled: An Act to authorize the City Council of Charleston to fill up low lots and grounds in the City of Charleston in certain cases, and for other purposes," ratified December 18th, 1830, and sections 227 and 228 of the Revised Ordinances of the City of Charleston, of the 26th day of September, 1882, are in violation of, and in contravention of the fifth amendment of the Constitution of the United States; that said Act of the General Assembly, and said Sections of said Revised Ordinances, were claimed by the said Doris Werner, defendant, appellant, both in the Court below as well as in this Court to be in conflict with the fifth amendment of the Constitution of the United States, and that the decision of this Court was in favor of the validity of both said Act and Ordinances, and that the decision of said question was necessary to the determination of this action in this Court, and that said question was actually decided by this Court in the decision made by it in said action, and that the judgment in this said action as rendered in this Court could not have been given without deciding this question,"

This would seem to be conclusive, inasmuch as it appears from an examination of the record, independent of the certificate of the Chief Justice of the State, that the validity of the statute was drawn in question as repugnant to the Constitution, and also that the decision sustained its validity; and further, that the right was especially set up or claimed and denied.

See grounds of appeal, page 9, paragraph 3.
Opinion of Supreme Court of South Carolina, page 10.
Certificate of Chief Justice of South Carolina, page 15.
Powell vs. Brunswick Co., 150 U. S., page 433.

J. Moultrie Mordecai.